BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of TELEPHONE COMPANY-CABLE TELEVISION Cross-Ownership Rules, Sections 63.54-63.58	)	CC Docket No. 87-266
and	)	
Amendments of Parts 32, 36, 61, 64, and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service	)	RM-8221

REPLY COMMENTS OF SOUTHWESTERN BELL CORPORATION

Comes now Southwestern Bell Corporation ("SBC") and files these *Reply Comments* in response to the Federal Communications Commission's ("FCC" or "Commission") *Third Further Notice of Proposed Rulemaking.*[1]

I. THE FCC SHOULD RECONSIDER ITS REJECTION OF ANCHOR TENANT IN LIGHT OF ITS DESIRE TO PROMOTE VIDEO SERVICES COMPETITION.

SBC indicated in its *Initial Comments* herein how strongly it believes that the FCC has erred on the side of stifling competition by rejecting the "anchor tenant" concept for analog capacity which SBC and others had urged. But support for the concept was not limited to telephone companies (who were unanimously in favor). Liberty Cable Company served notice that it intends to petition the Commission for reconsideration of this issue and argued that the best way to satisfy the Commission's desire to ensure that video dialtone prudently promotes competition is to permit a

[1] *Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking* (hereinafter *"Reconsideration Order,"* as appropriate), *In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, released November 7, 1994.

properly structured anchor tenant arrangement. SBC urges the FCC to consider Liberty's comments regarding anchor tenant carefully.

Home Box Office ("HBO") also (indirectly) supports the anchor tenant concept. In its *Initial Comments*, HBO reminds the Commission that "...consumers consistently demand packages of program services." *HBO* at p. 3. Therefore, HBO reasons, the FCC should ensure that allocation of analog capacity enable VDT packages to assemble packages that are comparable to other providers, i.e., CATV, DBS and wireless cable. *Id.* Thus, HBO urges the Commission to "...make clear that in considering the amount of capacity allocated to a single package, [it] will give considerable weight to the principle of comparability with alternative [providers]." *Id.* at p.4. The best way to do this, of course, is to permit anchor tenant arrangements.

II. THE FCC SHOULD REJECT THE "VIRTUAL DIGITAL" PROPOSAL FIRST RAISED BY GTE.

The Initial Comments overwhelmingly supported SBC's position that the "virtual digital" proposal was unworkable and unnecessarily complex.[2] Even GTE, the company which first proposed the idea in an application for a trial of a VDT arrangement, has now withdrawn the suggestion as too expensive. The Commission should do the same.

Broadband Technologies Inc. ("BBT") makes a compelling argument for the advantages of digital over analog capacity - provided one ignores the cost factor. Indeed, BBT admits that digital set-top boxes cost $700 per television set today (*BBT* at p. 19) and that digital encoders cost $1 per channel per home passed. *Id.* at p. 24.

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[2]*SBC* at pp. 3-4; *Ameritech* at pp. 1-2; *Bell Atlantic* at pp.3-4; *BellSouth* at p. 3; *Consumer Electronics Group of the Electronics Industry Association* at p. 3; *AT&T* at pp.3-5.

These two figures alone demonstrate the fallacy of the FCC mandating a particular technology choice for VDT Rather, it should (as it did initially) defer these judgments to those who directly serve end user needs. If an analog/digital network will be more costly in the long run, the companies serving the public must decide whether that piece is worth paying to attract those who will not accede to the use of a set-top box. Marketplace decisions should never be driven by bureaucratic dreams of the "perfect network," nor by self-serving arguments of vendors with obvious vested interests.

III. THE FCC SHOULD NOT MANDATE ANY TYPE OF "MUST CARRY" RULES FOR VDT OPERATORS OR THEIR PROGRAMMER CUSTOMERS.

Nothing in the *Initial Comments* should dissuade the Commission from agreeing with SBC and nearly every other party, including the National Cable Television Association, that "must carry" rules are both unlawful[3] and unwise. The Community Broadcasters' Association, for example, argues that "The place where programming is produced is not related to the programming's content, so regulations designed to ensure reasonable rates for local programming is not content regulation."[4] This analysis only addresses the propriety of creating different kinds of rate treatment for such broadcasting, not the fundamental flaw of all preferential access arrangements--the denial of the speaker's right to speak as he or she sees fit. That flaw can be erased only by avoiding the mandate altogether. The FCC should not make the same constitutional blunder twice.

National Association of Broadcasters ("NAB") is simply wrong when it

[3]*SBC* at pp. 13-17 and *NCTA* at pp. 19-23.

[4]*Comments* at p. 3.

suggests that "...the only First Amendment concerns [of a 'must carry' requirement] would be on the part of other programmers." *NAB* at p. 8. The VDT carrier has constitutional rights which are not lessened by its common carrier status. The constitutional infirmity of preferential access is that it limits the speaker's speech in favor of another, preferred group. The proposal of the Alliance for Community Media and the United Church of Christ ("the PEG Access Coalition") is equally flawed. While the PEG Access Coalition argues that the FCC should require VDT operators to grant free transmission capacity to its members in return for use of public rights of way (*Coalition* at p. 13), it points to no authority under the Communications Act for the FCC to (1) determine an appropriate use of state property rights and (2) assess the appropriate fee for such use. The proposal is nothing more than "must carry" dressed in public interest verbiage and is both unwise and illegal.

The *Comments of the Center for Media Education, Consumer Federation of America, Media Access Project and the People for the American Way* ("*Center*") do little to change this view. *Center* argues that noncommercial providers cannot afford VDT services (even though prices have not been established).[5] The same may be said for access to newspapers, books, magazines, and billboards, yet we allow the market to decide their highest and best use. Funding of the noncommercial entities is the *Center's* very real problem, but it should not be solved at the cost of the Constitution's most fundamental right. Free access for those with small budgets is simply not the same as "nondiscriminatory access," contrary to the argument of the *Association of America's Public Television Stations* (at p. 11). Otherwise the telephone companies must create a

[5]*Center* at p. 11.

sliding scale based on customer income for all their services. As reasoned in *SBC's Initial Comments*, the FCC should maintain its position that preferential access is unnecessary and unlawful.

IV. THE COMMISSION SHOULD NOT MANDATE OPEN ACCESS TO SET-TOP BOXES.

In its *Initial Comments* herein, Viacom "...calls for barrier-free access to set-top boxes employed with VDT systems."[6] In support of this notion, Viacom argues that the Commission should clarify that open access to video transport also means open access to the proprietary equipment developed for using a video dialtone network. In other words, Viacom wishes to usurp the substantial investment of capital and talent in developing the equipment simply because Viacom refuses to make such an investment on its own.

No one really knows how the video services to be provided by non-cable companies will be accessed in the future. In part, the answer depends on when one asks the question, for the set-top boxes required today to access digital programming may not be necessary in tomorrow's world of digital monitors and digital transmission. In the meanwhile, Viacom is well aware that no industry standard for VDT set-top boxes has been developed. Each programmer that wishes to access the VDT network must determine the best way to reach its customers, including the type of access which will be most attractive to it. Therefore, each programmer must be free to invest in developing this equipment without fear that it will be appropriated by its competitors without compensation.

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[6] *Viacom* at p. 6.

Viacom appears to assume that set-top boxes will be provided only by VDT operators or affiliates

> "[The Commission should] ensure that payment of the prescribed tariff for access to the basic platform would entitle the user to carriage over the full reach of the VDT network, including any set-top box or functionally equivalent element provided by a VDT operator or its affiliate...."[7]

Of course, this assumption is unfounded. Numerous navigation devices are used presently to access programming provided on television monitors. In addition to the so-called "universal remote," the typical household contains control boxes for video cassette recorders, remote control devices for built-in programming access (i.e., the "cable ready" set), often a remote control supplied by its CATV provider (a remote does not take the place of a set-top) and sometimes an antenna as well. By allowing the market to create solutions to networking problems, ingenuity builds better answers than regulation could ever dream. Moreover, if the VDT operator chooses not to provide the access equipment, the FCC simply has no authority to require a company designing a set-top box which meets the LEC's specifications to design it in a way that all could access it.

Viacom does make one reasonable request, but it has already been granted. As an enhanced service, under the Commission's rules, "...the technical specifications or parameters necessary to reach consumers over a VDT system [will] be made publicly available to all seeking carriage on the basic platform...,"[8] because network disclosure is required for such offerings.[9] If this suggestion is adopted, there

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[7] *Id.* at p. 8.

[8] *Id.*

[9] *In the Matter of Computer III Remand Proceedings, Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, CC Docket No. 90-623 (December 20, 1991), ¶ 68.

would be no need for requiring open access to set-top boxes, for each video information provider will be free to design its own set without giving any advantage to the VDT's affiliate.

V. IT IS UNNECESSARY, COUNTER TO THE PUBLIC INTEREST AND UNLAWFUL TO REQUIRE VIDEO DIALTONE SYSTEMS TO CARRY ALL LOCAL LPTV STATIONS.

The Community Broadcasters' Association requests the FCC to apply an even broader form of its "must carry" rules to VDT platforms, requiring unlimited access by any low power television ("LPTV") station. The illegality of such a proposal was addressed extensively in *SBC's Initial Comments* and above in Section III. In addition, however, one must understand that such an extension is both contrary to the purposes of the current "must carry" rules and the FCC's purpose for VDT.

The "must carry" rules are designed in principal part to ensure access by consumers to programming of the broadest diversity possible. CATV systems have limited capacity, however, and held virtual monopolies on video transmission, when the must carry rules were adopted. The rules thus required the carriage of full-power over the air broadcast stations as a means of ensuring programming diversity which might not develop absent regulation. This modest injection of competition was thought to provide a stimulus to the cable operator to provide strong competitive programming in response so that it could attract the advertising revenues which would follow the consumer's selection of programming. None of that is necessary for VDT, however, for the simple reason that VDT operators will have neither a *de jure* nor a *de facto* monopoly on programming delivery. If LPTV stations attract a sufficient audience, the VDT operators will want to carry them. If the LPTV stations raise an adequate cash flow from contributions or advertising, they may purchase access on the VDT network. If they can

do neither, however, one must question the wisdom of a government mandate for delivery of programming which few want.

VI. OPTIONS TO ACQUIRE PROGRAMMERS IF THE TELCO/CABLE CROSS OWNERSHIP RESTRICTIONS ARE LIFTED ARE NEITHER UNLAWFUL NOR INCONSISTENT WITH THE PRINCIPLES OF VIDEO DIALTONE.

The California Cable Television Association ("CCTA") contends that the FCC should forbid any future equity options by a VDT operator in a programmer-customer of its VDT network. While CCTA cites the cross-ownership provisions of the Communications Act and the *Reconsideration Order* herein, it nowhere admits the obvious conclusion that both the statute and that part of the *Order* are not likely to remain in force for long. Three appellate decisions have already held that the statute is unconstitutional; the cited portion of the order is subject to the same infirmity.[10] Indeed, the FCC appears to recognize this difficulty because it has announced an NPRM to address the terms under which affiliated programmers may access VDT networks.

Further, it is by no means inconsistent with the Commission's key purpose of VDT--to create strong competition for the CATV companies--to permit such diluted equity interests. An interest in the programming itself should make the VDT operator even more sensitive to consumer needs and wants, especially willingness to pay and ease of access. The Commission has recognized that this type of interest can only lead to the

[10] *Chesapeake and Potomac Tele. Co. of VA v. U.S. et al.*, No. 93-2340, *slip op.* (4th Cir., Nov. 21, 1994); *Pacific Telesis Group et al. v. U.S.A. et al.*, (No. 94-16064, *slip op.* (9th Cir., Dec. 30, 1994); *U S West et al. v. U.S.A. et al.*, No. 94-35775, *slip op.* (9th Cir., Dec. 30, 1994).

development of more innovative programming.[11]

VII. CONTINENTAL CABLEVISION IS WRONG WHEN IT CONTENDS THAT THE FCC SHOULD EXTEND POLE ATTACHMENT RULES TO VDT OPERATORS.

Continental Cablevision ("CCV") contends that the Commission's pole attachment rules, which currently apply only to telephone companies which offer channel service, should be extended to VDT operators as well. CCV's primary rationale for this extension of the rule is its perception of injustices inflicted by telephone companies on cable carriers. CCV singles out Southwestern Bell Telephone Company ("SWBT"), SBC's local exchange subsidiary, as charging "penalty rates" for pole attachments for fiber facilities and non-video services offered by cable companies.[12] CCV alleges SWBT's "...recent actions are clearly an effort to hamper cable's delivery of non-entertainment communications services."[13] Contrary to the allegation of CCV, SWBT charges the regulated pole attachment rate determined pursuant to Section 224 for both video and non-video communications of a franchised cable television system, pursuant to the ruling in *Texas Utilities Electric Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993). As SWBT explains in its *Response to Pole Attachments Complaint* filed today,[14] CCV and others seem to

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[11]*Reconsideration Order* at ¶ 56. Because the FCC specifically held in the Reconsideration Order that ownership of an equity interest in a programmer is permissible, even desirable, CCTA's argument is misplaced in this comment cycle. If CCTA objects to Anchor Pacific's arrangement, it should raise the issue in a petition for reconsideration of the Reconsideration Order.

[12]*Comments* at p. 27.

[13]*Id.*, n.82.

[14]*Texas Cable TV Ass'n. et al. v. SWBT*, PA No. 95-00 (filed December 16, 1994). Because that response contains voluminous attachments, SBC attaches only the text of the *Response* itself.

have misunderstood notice letters SWBT sent to pole attachment customers. These notices included both the regulated rate for cable operators and the nonregulated rates applicable to noncable operators and cable companies outside their franchised territories, but they did not attempt to assess the nonregulated rate to CCV. Similarly, CCV's allegations that SWBT has been "gaming" the regulatory process through its pole attachment rate calculations[15] is nothing more than a disagreement in how to interpret the FCC's accounting rules, not an "attempt...to profit from the regulatory lag in the processing of FCC pole complaints...."[16] In any event, the pendency of these complaints demonstrate that CCV has sought the wrong forum to air its grievances. Two other dockets (at least) will address the merits of the relative positions. The FCC need not burden its VDT record with this issue as well.

VIII. CONCLUSION

The Commission's video dialtone rules cry out for revision to accommodate mammoth changes in the legal and economic landscape, but the proposals in this *NPRM III* are counterproductive, unlawful in some instances and unnecessary in others. The Commission should reconsider permitting anchor tenant arrangements, permit the offering companies to choose the digital/analog capacity mix, allow equity and other

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[15]SBC also points out that on August 26, 1994, SWBT filed its own Petition with the Commission regarding the matters alleged in CCV's *Pole Attachment Comments*, in an effort to secure a quick resolution to these issues.

[16]*Pole Attachments of CCV*, p. 28.

alliances between telephone companies and programmers and expand on the role VDT operators are permitted to play in the design of a VDT programming package.

Respectfully submitted,
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January 17, 1995

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of TEXAS CABLE TV ASSOCIATION, ARKANSAS CABLE TELEVISION ASSOCIATION, KANSAS CATV ASSOCIATION, MISSOURI CABLE TELECOMMUNICATIONS ASSOCIATION and CABLE TELECOMMUNICATIONS OPERATORS OF OKLAHOMA, *ET AL.*, *Complainants,* v. SOUTHWESTERN BELL TELEPHONE COMPANY *Respondent.*	P. A. No. 95- _____

RESPONSE TO POLE ATTACHMENT COMPLAINT

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ATTORNEYS FOR
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In the Matter of TEXAS CABLE TV ASSOCIATION; ARKANSAS CABLE TELEVISION ASSOCIATION, KANSAS CATV ASSOCIATION; MISSOURI CABLE TELECOMMUNICATIONS ASSOCIATION; and CABLE TELECOMMUNICATIONS OPERATORS OF OKLAHOMA, *ET AL.*, *Complainants*, v. SOUTHWESTERN BELL TELEPHONE COMPANY *Respondent*.	P.A. No. 95-_____

To: The Commission

RESPONSE TO POLE ATTACHMENT COMPLAINT

Southwestern Bell Telephone Company ("SWBT"), by its attorneys, hereby files its Response to the Pole Attachment Complaint (the "Complaint") filed on December 16, 1994 by the Texas Cable TV Association, the Arkansas Cable Television Association, the Kansas CATV Association, the Missouri Cable Telecommunications Association and the Cable Telecommunications Operators of Oklahoma on behalf of certain of their respective members.

As and for its Response to the Complaint, SWBT generally and specifically denies all allegations of fact contained in the Complaint except for those allegations which are hereafter specifically admitted. For further Response, SWBT states as follows:

1. SWBT admits that this is a pole attachment rate Complaint brought against SWBT. SWBT denies that SWBT imposed unlawful and unreasonable pole attachment rates to become effective January 1, 1995. SWBT is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 1, and therefore denies same.

2-6. SWBT is without knowledge or information sufficient to form a belief as to the truth of allegations of paragraphs 2 through 6, and therefore denies same.

7. SWBT admits the allegations of the first sentence of paragraph 7. SWBT admits that its general office address is One Bell Center, St. Louis, Missouri 63101.

8. SWBT admits that the Commission has jurisdiction over the Complaint pursuant to the Pole Attachment Act of 1978, 47 U.S.C. § 224 ("Section 224"). SWBT denies the remaining allegations of paragraph 8.

9. SWBT admits that SWBT owns or controls utility poles in Arkansas, Kansas, Missouri, Oklahoma and Texas and that such poles are used for purposes of providing wire communications. SWBT is without knowledge or information sufficient at this time to form a belief as to the truth of the remaining allegations of paragraph

9 relative to the attachments on SWBT's poles as set forth in Attachment 1 to the Complaint or as to the matters set forth in footnote 2 of the Complaint, and therefore denies same.

10. SWBT admits the allegations of paragraph 10.

11. Upon information and belief, SWBT admits that Arkansas, Kansas, Missouri, Oklahoma and Texas do not regulate the rates, terms and conditions of pole attachments.

12. SWBT states that it received the Complaint on Tuesday, December 20, 1994 SWBT is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 12, and therefore denies same.

13. On August 26, 1994, SWBT filed with the Commission the Petition for Clarification, or in the Alternative, a Waiver (the "Petition"),[1] and the Commission placed the Petition on Public Notice on November 14, 1994 (DA 94-1232) and requested parties to file comments on SWBT's proposal. In the Petition, SWBT explained why it is essential to clarify the formula to be consistent with the purposes of Section 224 to allow SWBT to recover a pole attachment rate based upon the fully allocated cost of the poles. The high cost of removal of poles has caused the depreciation reserve to be large compared to the gross pole investment resulting in negative, or an artificially low, net pole cost in SWBT's five states. The resulting net pole cost is so low that SWBT is not permitted to recover its pole investment and future removal costs in a manner consistent with the fully

[1] See Exhibit 4.

allocated cost recovery allowed by Section 224. This conclusion is especially obvious in those two states where SWBT's net pole cost is negative: Oklahoma and Kansas. But for the fact that the same negative net pole cost is included in the computation of the carrying charges and as a result two negative numbers are multiplied by each other, the pole attachment rate would also be negative in these two states.[2] However, focusing on the cause of the problem (large removal cost), it is also obvious that the problem is not limited to the states where net pole cost has turned negative. A larger future removal cost should cause an increase in the pole attachment rate, not a reduction, as it has done in SWBT's circumstances. This is so because SWBT is supposed to recover future removal cost as part of the depreciation expense component of the formula.[3] SWBT's solution, as described in the Petition, is to remove accrued future net salvage (i.e., salvage less removal costs) from the depreciation reserve. By removing future net salvage from the depreciation reserve, SWBT avoids the problem that is possible in the current formula when the depreciation reserve exceeds the original investment before SWBT has fully recovered that original investment or when the depreciation reserve is

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[2] For a numerical example showing how the two negative components result in a positive rate, see footnote 7 of the Petition attached as Exhibit 4. It is a mere coincidence that erroneous negative investment and negative carrying charges result in a positive rate; there is no logic that could support this application of the formula.

[3] See, e.g., American Television and Communications Corp. v. Florida Power Corp., File Nos. PA-83-0035 & PA-84-0004, 1984 FCC LEXIS 2431, ¶ 10 (released July 3, 1984).

approaching the size of the original investment before SWBT has recovered the majority of that original investment. This anomaly occurs because the formula's gross pole investment does not include the removal cost being accrued each month in the depreciation reserve. This would not be as problematic with most assets, but in the case of poles, the removal cost is so high that the recovery of future net salvage is a large part of the depreciation reserve, as reflected in the Commission's prescription of future net salvage rates as high as -138% in one of SWBT's states.[4] SWBT's clarification of the formula is explained in more detail in the Petition, in SWBT's Reply Comments filed on December 30, 1994 in connection with the Petition and elsewhere in this Response. In further response to paragraph 13 of the Complaint, SWBT admits the allegations of footnote 4. Admitting that SWBT increased its pole attachment rates by clarifying the Commission formula in the manner described in the Petition prior to a Commission ruling on the Petition, SWBT states that it had the right to do so. First, the Commission formula as applied to SWBT's, and any similarly situated utility's, circumstances results in an artificially depressed, and in some cases illogical, rate. Second, in SWBT's five states, the Commission formula also results in a rate which is far below the statutory maximum rate set forth in Section 224. Third, SWBT has the right to charge any rate that does not exceed the statutory maximum rate set forth in Section 224 as reasonably construed by

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[4] The Prescription of Revised Percentages of Depreciation Pursuant to the Communications Act of 1934, 8 FCC Rcd 816 (1993) (Oklahoma).

the Commission and, absent a negotiated rate, the customary procedure for obtaining a Commission determination of the maximum rate is through the Commission pole attachment complaint procedure set forth in Section 1.1401 et seq. of the Commission's Rules.[5] Fourth, during 1994 SWBT discussed its plans to increase pole attachment rates with certain members of the Commission staff.

Responding to the allegations of footnote 3, SWBT states that the letters sent by Wayne White on December 9, 1994 (Attachment 17 to the Complaint) reflected Mr. White's misunderstanding of SWBT's Petition and of the Commission's involvement in approving changes in pole attachment rates and Mr. White subsequently sent letters on December 16, 1994 correcting the misstatements in his earlier letter. See Exhibit 1. SWBT denies the allegations characterizing SWBT's approach in implementing the pole attachment rate increases and states that Mr. White's action was an isolated error which was not committed in any of SWBT's other market areas. SWBT denies the remaining allegations of paragraph 13.

14. SWBT admits that the Complainants sent the letter (Attachment 9 to the Complaint) to the Commission in response to

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[5] See Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Report and Order, CC Docket No. 86-212, 2 FCC Rcd 4387 ¶ 53 and n. 27 (1987) ("Report and Order") ("These formulas are treated as rebuttable presumptions: they are used unless a utility chooses to present probative direct evidence regarding an acceptable alternative to meet its unique circumstances."); Adoption of Rules for the Regulation of Cable Television Pole Attachments, Second Report and Order, CC Docket No. 78-144, 72 FCC 2d 59, 73 ¶ 31 (1979) ("[T]he utility's actual rates may be based upon any methodology, but must fall between . . . incremental and fully allocated . . . .").

the Petition. SWBT states that the letter speaks for itself. SWBT denies the remaining allegations of paragraph 14.

15-17. SWBT admits the allegations of paragraphs 15 through 17.

18. SWBT admits that some cable operators in Missouri received notice of their pole attachment rate increase by letter dated November 10, 1994. SWBT admits the allegations in the second sentence of paragraph 18. For further response to the allegations of paragraph 18, see paragraphs 22-23 below.

19-20. SWBT admits the allegations of paragraphs 19 and 20.

21. SWBT denies the allegation that SWBT is attempting to impose on cable operators within their cable systems an annual pole attachment rate as high as $86.40 per pole. SWBT acknowledges that the regulated pole attachment rate determined pursuant to Section 224 now applies to both video and non-video communications of a franchised cable television system.[6] However, SWBT's standard rate schedule included in SWBT's notice letters to cable operators lists both the regulated and the nonregulated rate applicable to companies other than cable operators and to cable operators outside of their franchised cable systems. The inclusion of the nonregulated rate in the notice letters was not intended to apply to cable operators' pole attachments within their franchised cable systems; rather, that rate would only apply to a cable operator to

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[6] Texas Utils. Elec. Co. v. FCC, 997 F.2d 925 (D.C. Cir. 1993) (Texas Utilities).

the extent that the attachment was outside of their franchised cable systems. Complainants have not complained of any specific attempt to charge them the nonregulated rate in a manner contrary to Section 224. SWBT believes the Complainants have mischaracterized SWBT's rate increase notices in an attempt to make it appear that SWBT has acted improperly. There is no genuine controversy between the parties with respect to the nonregulated rate and, in particular, Complainants have not shown that the nonregulated rate is, in fact, being applied to them contrary to Section 224. Neither have Complainants shown how any SWBT actions relating to the nonregulated rate have caused them any harm or detriment. Therefore, the Commission should not address the matter complained of in paragraph 21.[7]

22. SWBT states that Section II.D. of SWBT's standard Licensing Agreement for Pole Attachments (the "Agreement") speaks for itself. Section II.D. states in pertinent part as follows:

> Upon at least 60 days prior written notice to Applicant, Telco may make changes in the amount of the fees and charges specified in APPENDIX I. Such changes shall become effective on the first day of the month of January following the date of notice.

SWBT states that to the extent SWBT did not comply with the above-quoted provision of the Agreement, SWBT will not increase the rate effective January 1, 1995. In particular, SWBT will not increase

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[7] See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 473 (1982) (courts' adjudicative power limited to litigants that can show an "injury in fact" resulting from "the action which they seek to have the court adjudicate").

the rate effective January 1, 1995 for those Kansas and Missouri operators who were notified by letter dated November 10, 1994. SWBT is in the process of taking corrective action for those cable operators who were notified by letter dated November 10, 1994. SWBT intends to charge such Kansas and Missouri cable operators the 1994 rate. Paragraph 13 above contains SWBT's response to the allegations of footnote 12 of the Complaint. SWBT denies the remaining allegations of paragraph 22.

23. While the November 10, 1994 rate increase notice was sent to some cable operators in western Missouri, an earlier notice was sent to cable operators in eastern Missouri.[8] See Exhibit 2. Therefore, the rate increase will apply to cable operators in eastern Missouri who received the earlier notices. Paragraph 22 above contains SWBT's response to some of the allegations of paragraph 23 of the Complaint. SWBT is without knowledge or information sufficient to form a belief as to the truth of the allegations of footnote 13, and therefore denies same.

24. SWBT's pole attachment rates were calculated in a lawful manner. SWBT submits Appendix A attached to this Response to show the details of SWBT's calculation of its pole attachment rates, including each component of the formula, and to comply with the requirement of Section 1 1407 of the Commission's Rules that SWBT's Response include justification of the rate alleged not to be

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[8] Western Missouri includes the 816 and 417 area codes and Eastern Missouri includes the 314 area code.

just and reasonable.[9] SWBT denies the allegations of paragraph 24.

25. SWBT states that Complainants' summary of the discussions preceding filing of the Complaint mischaracterizes Complainants' efforts to resolve the problem before filing the Complaint. First, Complainants imply that their representative, Mr. Arnold, was the first to contact SWBT to resolve the matter; however, SWBT made the initial efforts to contact Mr. Arnold in August 1994 prior to filing the Petition, and once SWBT was successful in reaching Mr. Arnold, SWBT arranged to meet with him. Second, contrary to the reference to "meetings" in paragraph 25, SWBT only had one meeting with Mr. Arnold concerning this matter in 1994, following which SWBT made a proposal to Mr. Arnold. Third, Mr. Arnold rejected the proposal without making any counterproposal and did not contact SWBT again concerning a resolution of his concerns prior to filing the Complaint. Thus, there were not any additional "efforts" by Complainants to resolve the dispute prior to filing the Complaint.[10] Finally, Complainants had ample time to consider the problem with the Commission's formula described in the

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[9] Although SWBT believes that the only components of the formula about which there is a genuine dispute are the depreciation reserve for poles and the maintenance expense, SWBT has provided the details of its calculation of all of the components of the formula in Appendix A, which goes beyond what is required by Section 1.1407. SWBT's summary sheets for the calculation of the 1995 pole attachment rates for each of its five states are attached as Attachments 11c, 12c, 13c, 14c and 15c to the Complaint.

[10] SWBT did receive a letter from counsel for Complainants on Friday, January 13, 1995 -- only one full working day before SWBT's Response has to be sent to the Commission -- inquiring whether SWBT wishes to discuss settlement possibilities. Given the timing of the inquiry, SWBT has not had an opportunity to assess it.

Petition because SWBT first discussed the issue with representatives of Complainants in the Fourth Quarter of 1993. See Exhibit 3. SWBT states that Attachments 7 and 8 to the Complaint speak for themselves. SWBT is without knowledge or information sufficient to form a belief as to whether Mr. Arnold was acting on behalf of all of the Complainants at all relevant times as alleged in paragraph 25. SWBT denies the remaining allegations of paragraph 25.

26. SWBT denies any attempt to inflate its pole maintenance expenses in Missouri, Oklahoma and Texas, as alleged in footnote 16 of the Complaint. SWBT's calculations set forth in Appendix A-10 show that SWBT has properly calculated its pole maintenance expenses. SWBT's method of calculating pole maintenance expenses is based upon a letter dated June 22, 1990 from Mr. Kenneth P. Moran to Mr. Paul Glist attached to Appendix A-10. Complainants' method conflicts with the clarification contained in such letter from Mr Moran and Complainants have provided no explanation whatsoever to justify their calculations for Missouri, Oklahoma and Texas, which calculations are also inconsistent with the Complainants' Arkansas and Kansas calculations.[11] Although Complainants allege that SWBT "has attempted to inflate certain cost components of its multistate operations," they do not specifically complain about anything other than the pole maintenance expenses. SWBT denies the allegations of paragraph 26.

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[11] See Appendix A-10 and Item 5 of Appendix B.

27 A. Except as expressly provided below, SWBT denies the allegations of paragraphs 27-34. The main disagreement between SWBT and the Complainants regarding the pole attachment rates is that Complainants dispute SWBT's removal of accrued future net salvage from the depreciation reserve component of the net pole cost formula as described in SWBT's Petition. Most of Complainants' arguments against such removal contained in paragraphs 27-34 were previously filed as comments on SWBT's Petition. SWBT's response to these arguments are contained in Reply Comments filed by SWBT on December 30, 1994. See Exhibit 4. SWBT stands by its Petition and its response to Complainants' arguments, which response is reflected in such Reply Comments, and explains its position in further detail in this paragraph and the paragraphs that follow.

27 B. The common thread underlying Complainants' position is that SWBT has created a "phantom asset" -- also referred to as an "inflated net rate base." As demonstrated in the Declaration of John P. Lube, attached as Appendix C, there is no "phantom asset" and what Complainants appear to refer to as a "phantom asset" is not an asset at all; instead, it is an amount representing the recovery of the future net salvage.[12] SWBT admits that it has added future net salvage to the depreciation reserve and that this has resulted in a large depreciation reserve.

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[12] See Declaration of John P. Lube ¶ 4.01-4.11. The Declaration of John P. Lube contains a theoretical analysis of applicable depreciation principles which are pertinent to a number of Complainants' arguments. SWBT submits such Declaration to refute Complainants' faulty arguments.

However, contrary to Complainants' position, there is nothing wrong with including future net salvage in the depreciation reserve for depreciation purposes. In fact, the Commission procedures require that depreciation rates be calculated in a manner that includes future net salvage.[13] It is not improper to include future net salvage in the depreciation reserve for depreciation purposes; however, it is a problem to do so for purposes of the net pole cost calculation of the pole attachment rate. By including future net salvage in the depreciation reserve, but not in the gross pole investment, the depreciation reserve will equal or exceed the gross pole investment before SWBT has fully recovered its gross pole investment.[14] This problem is illustrated by the example set forth in Attachment A to the Petition. See Exhibit 4. In that example, each year $30.00 of the original book cost of $300 and $41.40 of the future net salvage of $414 is recovered. After less than 5 years, the depreciation reserve would exceed the $300 original book cost even though only $150 of the original book cost had been recovered through year 5. Paragraphs 4.03-4.07 of Appendix C to this Response contain another hypothetical that illustrates the problem with the net pole cost calculation. The bottom line is that as long as SWBT has not fully recovered its original investment, SWBT will continue to have an investment in poles on which it is entitled to calculate and recover pole attachment fees. The inclusion of future net salvage in the depreciation reserve,

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[13] See Declaration of John P. Lube ¶¶ 1.01-1.02.

[14] See Declaration of John P. Lube ¶¶ 2.01-2.05.